FILE COPY

NOV 13 1943

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 9

GLASS CONTAINER ASSOCIATION OF AMERICA, INC.,
CHARLES R. STEVENSON AND EMORY G. ACKERMAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

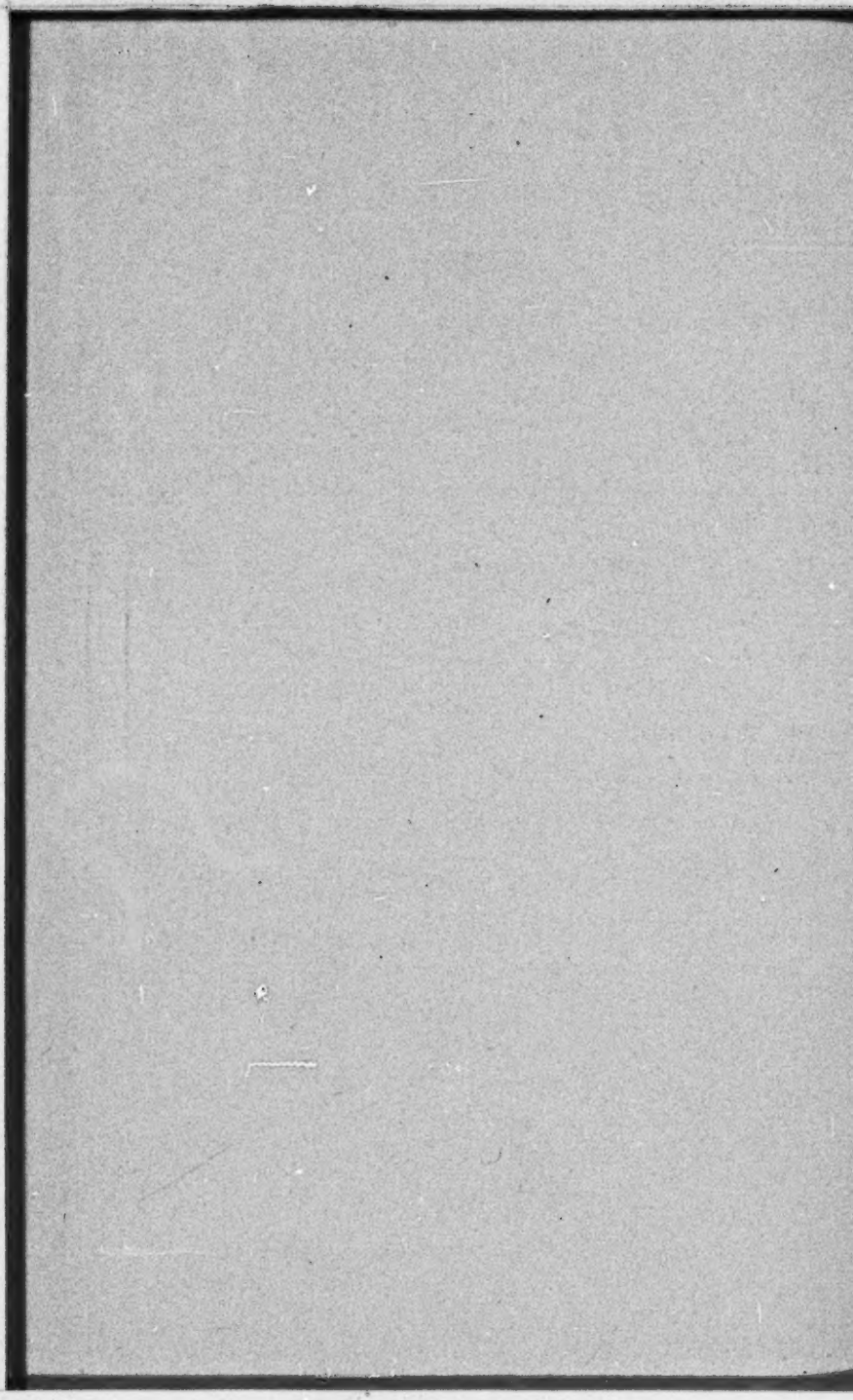
APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF OF APPELLANTS.

LUTHER DAY,
RUFUS S. DAY,
Attorneys for Appellants.

JONES, DAY, COCKLEY & REAVIS,
1759 Union Commerce Bldg., Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647



INDEX.

I. The Appellants Were Not Parties to the Conspiracy as Charged 2

II. The Appellants Were Not Parties to a Conspiracy to Stabilize Prices or Maintain Price Leadership 2

III. The Appellants Did Not Improperly Restrict Production by Means of the G.C.A.'s "Quota" System 4

IV. All Questionable Aspects of the G.C.A.'s Forecast System Were Abandoned Before This Action Was Instituted 9

V. The Appellants Did Not Improperly Nor Unlawfully Prevent Expansion of the Glass Industry.. 11

VI. The Decree 11

Paragraph 37 11

Paragraphs 38 and 39..... 12

Paragraph 40 13

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 14.

GLASS CONTAINER ASSOCIATION OF AMERICA, INC., CHARLES R. STEVENSON AND EMORY G. ACKERMAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF OF APPELLANTS.

In this reply brief, we shall confine ourselves, in so far as possible, to a consideration of the points sought to be made by the appellee in its brief and not specifically anticipated in our main brief which, we believe, presents an answer to the propositions of law and fact upon which the appellee relies. This reply brief, as did our main brief, will refer for the most part to the appellant Glass Container Association (hereinafter styled the "G.C.A."), but it is filed as well in behalf of the individual appellants Stevenson and Ackerman.[1]

[1] The evidence in the record relating to the individual appellants Stevenson and Ackerman is confined to their acts in connection with the affairs of the G.C.A. As we have seen, the appellant Ackerman severed his connection with the G.C.A. on December 31, 1940, when he became president of the Thatcher Manufacturing Company.

I.

THE APPELLANTS WERE NOT PARTIES TO THE CONSPIRACY AS CHARGED.

We believe this phase of the case is sufficiently covered by our main brief (pp. 9 and 11).

II.

THE APPELLANTS WERE NOT PARTIES TO A CONSPIRACY TO STABILIZE PRICES OR MAINTAIN PRICE LEADERSHIP.

Notwithstanding the fact that the District Court made no finding of fact against the appellants relative to price leadership or prices in any aspect, and refused to adopt appellee's proposed findings in that regard (appellee's proposed findings of fact 502, *et seq.* R. IX, 7033), the appellee contends that the G.C.A. was a party to an attempt to institute a system of price leadership. However, the action of the District Court in this regard is fully supported by the record.

The specific acts upon which the appellee relies are so trivial as perhaps not to merit serious consideration. It is contended that a system of price leadership, at least as to Owens, was created in 1929 by concerted action of representatives of Hazel, Owens and the G.C.A. The evidence in support of this contention is a letter dated July 18, 1929, ten years before this action was filed, from Hartley, of Turner, to Mandeville, of Thatcher, the writer obviously not attempting to act or speak for the G.C.A. In this letter (Ex. 1505, R. XXII, 14000) reference is made to a meeting between McNash, Levis and Whitall, followed by a trip to Toledo by Rummel, then assistant business manager of the G.C.A., and Levis; and an arrangement that "the industry would be helped *'if Mr. Levis'* [2] (of Owens) would come out with a price list on all qualities and quantities, showing just exactly what they were getting for the products," and

---

[2] Emphasis throughout this brief is ours.

would see that Owens adhered strictly to the list unless it were affected by competition, which would then be met with no discrimination. It is stated that Rummel believed that this could be done, but that the appellant Stevenson would like to do it "the other way"; and the writer expressed his personal opinion that the G.C.A. "is making progress." But there is no evidence that the arrangement was ever consummated, and the District Court was clearly right when it refused to adopt a finding of fact proposed by the appellee to the effect that "the Association sought to create a system of price leadership by which the members of the Association would follow the prices of Owens as published by Owens in its price list (Ex. 1505)." (Appellee's proposed finding of fact No. 502, R. IX, 7033.) The only other contention of appellee in its brief, in this regard relating to the G.C.A. is that numerous price lists of Owens were found in its files, but the record fails to disclose any acts in this connection by the G.C.A. which could be construed as being in furtherance of the conspiracy.[3]

---

[3] All the price lists included in Exhibits 1389 A and B and 1731 were issued, not by the Owens-Illinois Glass Company, but by the Owens-Illinois Pacific Coast Company; and on the East Coast, where Exhibits 1389 A and B were found, they could have been of no use except for the purpose, which Ackerman described, of constructing a chart of past price trends, for they quoted only delivered prices in California and other western points. Ackerman testified at page 3518, R. V that the small quantity of price information that the G.C.A. from time to time possessed was not "confidential; it was price information that anyone could have secured from any company." At pages 3524-25, R. V he said that he received many price inquiries, not from members of the Association, but "usually (from) customers or potential customers of glass containers"; and that the few inquiries from Association members came when a manufacturer was considering going into a different line of bottles. In answer to the question: "Did you give them the information as to the prices charged by other members of the Association?" Ackerman answered: "No. I probably gave what information I had, but since our information was not current, I probably would have suggested to them that they get in touch with others who were making that line of bottle."

III.

THE APPELLANTS DID NOT IMPROPERLY RESTRICT PRODUCTION BY MEANS OF THE G.C.A.'S "QUOTA" SYSTEM.

The appellee contends that resort was had to "moral sanctions" to compel members of the G.C.A. to keep within their "quotas" and to thereby limit production, relying principally upon the following findings of fact of the District Court (R. X, 7377):

> "503. The statistical reports sent to the Association members were designed to limit and in some instances did limit production of glass containers by members of the Association through the threat of exposure of a deviation from its quota by each of said members and the resultant criticism if the member had sold more than its 'forecast' or 'quota' (Exs. 1504, GCA-5295, 667, 1761, 432, 261. 809, 811, 1306, 419)."
>
> "504. The dissemination of monthly reports by the Association was designed to stabilize the production and distribution of glass containers in the United States."

The emphasis placed upon this question prompts a brief re-examination of the record relating thereto. There is no substantial evidence tending to show that any coercion was practiced or that threats were made by the G.C.A. to compel any member of the G.C.A. or of the industry to comply with the "quotas." On the contrary, the actual figures as to production over the years from 1928 to 1939, especially those for the smaller and medium-sized companies, show that the reverse was true (see our main brief, pp. 19-22). The exhibits upon which the District Court relied in reaching its conclusion upon this question, we respectfully submit, do not warrant the findings made. The letters in question were not written by the G.C.A., nor by any one authorized or purporting to speak in its behalf; they contained merely the expressions of the personal opinions of the individuals who wrote them, and

they do not, by any reasonable interpretation, contain any threats of exposure against those who fail to comply with the "quota" system. Many of them were written as far back as 1929 or 1930; and two of them were written by Rieman, then of Capstan, in July, 1935, after the N.R.A. had been declared unconstitutional and when a possible continuation of the practice theretofore authorized by the code was being considered by the industry.

In support of our contention upon this question, and for more convenient reference, we have set forth a list and description of these exhibits in a note hereto, and regret that space will not permit their being set forth in their entirety.[4]

The appellee contends that the G.C.A. was a meeting place and "breeding ground for appellants' illegal conspiracies," (Br. p. 292) and reference is made to a statement by the District Court in its opinion to the same general effect with relation to the statistical committee. In support of this contention, appellee in its brief (pp. 292-3, note 52, p. 293) says:

---

[4] These exhibits are:

Ex. 1504 (R. XXII, 13999), a memorandum prepared by Hartley of Turner Glass dated May 6, 1929;
GCA-5295 (R. XXV, 14971), a letter from King of Turner Glass to Hartley, dated May 9, 1929;
Ex. 667 (R. XX, 13335), a letter (dated Aug. 9, 1929), from Eldred of Hartford to Carter of Owens;
Ex. 1761 (R. XXII, 14247), a memorandum by Henry Knox Smith of Hartford, dated August 12, 1929;
Ex. 432 (R. XX, 13054), a letter of Mandeville of Thatcher to F. G. Smith of Hartford, dated Dec. 30, 1929;
Ex. 261 (R. XIX, 12809), a memorandum of Henry Knox Smith, dated Nov. 29, 1930;
Ex. 809 (R. XXI, 13478), a letter from Rieman of Capstan to Anchor Co., dated July 3, 1935;
Ex. 811 (R. XXI, 13480), same to same, dated July 15, 1935;
Ex. 1306 (R. XXI, 13897) Memorandum of Ohrn of Hartford to Pease of Hartford, dated Aug. 15, 1938;
Ex. 419 (R. XX, 13037), a letter of Pease of Hartford to Carter of Owens, dated Mar. 7, 1930.

> "At least two of the major matters complained of in the instant suit had their inception *at meetings of the Association.* Levis, McNash and Root took up with Collins *at an Association meeting* at White Sulphur Springs in the summer of 1932, the surrender by General of its fruit jar rights in order to help Hartford induce Ball to accept a Hartford license (R. 2146). The following spring *at another meeting of the Association* at White Sulphur Springs, Levis and Werbe had a conversation which led to negotiations culminating in the August 1933 forming machine deals (R. 2746-7)."

The record discloses, however, that the matters referred to were not G.C.A. matters at all. The occasion of the meeting of Levis, McNash, Root and Collins in the summer of 1932 is thus described by Levis (R. III, 2146):

> "It was a Glass Container Association meeting, general jollification. My brothers joined me there. I had not been home for a long time. My father was there, Mr. Ball, Mr. Root, and his son. *We had finished the Glass Container meeting, and we were sitting around having a family talk.* I remember the meeting thoroughly."

The other meeting to which the appellee refers occurred in the spring of 1933 upon the occasion of a G.C.A. convention at White Sulphur Springs, but it was in no sense a G.C.A. meeting nor connected with its business (R. IV, 2746-7). Surely, the G.C.A. should not be penalized nor branded as a conspirator merely because one of its meetings or conventions was made the occasion for a meeting between individuals who, after the G.C.A. meetings had been concluded, and, in conferences wholly separate and apart therefrom, discuss among themselves business totally unconnected with the G.C.A.

We have set forth as appendices D, E, F, and G, respectively, to our main brief, reproductions of certain G.C.A. exhibits consisting of charts showing the progress

from 1928 to 1939 of three respective groups of the G.C.A., i.e. the smaller group shipping less than 200,000 gross in 1928, the medium-sized group shipping more than 200,000, but less than 1,000,000 gross in 1928, and the larger companies shipping more than 1,000,000 gross in 1928. The purpose, and we believe the effect of this evidence, is to establish that, during the time when it is charged the quota system was in effect, the progress in percentage of shipments of the smaller and medium-sized companies was much greater than that of the larger and allegedly controlling companies, thus demonstrating that there was no agreement to limit production nor to enforce the quotas by moral sanctions, or otherwise.

The appellee in its brief (pp. 297, 298, note 59) questions the accuracy of these exhibits, principally for the reason that they do not disclose the history of those companies which went out of business before 1939, or which were acquired by other companies after 1928, the figures for the subsequently acquired companies beginning with 1928 having been included, in the charts, within the figures given for the acquiring companies (R. IX, 6624-5). While it is true that the exhibits do not disclose the individual progress of these companies during the comparatively short periods of time they were operated as separate concerns (some were acquired in the years 1929, 1930 and 1931), this fact does not affect the value of the charts as evidence for they do disclose the progress of such of the smaller and medium sized companies, constituting the great majority thereof, which were not acquired by other companies and continued their individual operation from 1928 to 1939, and they do reveal a situation which we believe could not possibly exist if there were an agreement or conspiracy to limit production, or to enforce the quotas by moral sanctions, or otherwise.

We believe that perhaps the appellee has misconceived the purpose of these charts which, of course, was not to

show that only a few of the companies acted pursuant to an agreement to limit production, but rather to establish by the progress of the various companies, the total absence of any agreement or conspiracy. Where an illegal restraint has been proved to exist, it may be no defense that the quantity of interstate commerce affected is small; but where there is no direct proof of the restraint, and the attempt is made to infer that *parallel* action was in fact *concerted* action, it is most important to discover whether the parallelism was substantial and therefore probably resulted from an understanding, or whether it was insubstantial and therefore probably resulted from mere coincidence.

The appellee in its brief, page 297, note 58A, sets forth Webster's definition of "quota" as meaning "a proportional part or share; the share or proportion assigned to each in a division or to each member of a body," and suggests that the individuals who employed this term should be held to have knowledge of its precise meaning and be judged accordingly. We believe that such a rule, if applied generally, would hold business men to a degree of learning and accuracy not usually found, and that, in any event, a more plausible definition of the term as it was actually used is found in the testimony of Rieman (R. III, 2068, 2069) that, after the N.R.A., the word quota became a slang term for volume of production or volume of business.[5] [6]

---

[5] The most accurate description of the manner in which the capacity figures were computed in the statistical reports which were distributed to the industry before the change of form in 1939 is found in the testimony of the witness Hall (R. IX, 6622).

[6] The appellee, in its brief (pp. 159, 160), refers to the testimony of the witness Hartley, of Turner, that the appellant Stevenson said "he was going to shut down factories and get the balance between capacity and demand." There is no substantiation nor corroboration in the record of this statement. No such finding of fact was made by the District Court, nor was any requested by the appellee. The wholly unreliable nature of this witness's

(*Continued on next page*)

IV.

ALL QUESTIONABLE ASPECTS OF THE G.C.A.'S FORECAST SYSTEM WERE ABANDONED BEFORE THIS ACTION WAS INSTITUTED.

Appellee suggests, as it did in the District Court, that the abandonment by the G.C.A. of its theretofore existing system of forecasts in July 1939 was due to an investigation by the T.N.E.C. of certain phases and activities of the glass industry. However, upon the undisputed facts in the record, this investigation had nothing to do with the change in the form of the statistical reports, which was due, as pointed out in our main brief, to action by counsel for the Armstrong Cork Company, a member of the G.C.A., who believed that the earlier system might be regarded as "suspicious." The District Court not only made no finding that the G.C.A.'s action in this regard was actuated in whole or in part by the investigation, but refused to adopt proposed findings to that effect submitted by the appellee (see appellee's proposed finding Nos. 498 and 499, R. IX, 7032). And that there was no connection whatsoever between the investigation and the action of the G.C.A. was testified to by Hall, now assistant business manager of the G.C.A. (R. IX, 6640).

It is contended by the appellee that the new form of statistical report adopted in 1939 is objectionable in that it constitutes a distribution of "monthly statistics in a form readily susceptible to the imposition of moral sanc-

---

(*Continued from preceding page*)

testimony will be disclosed by an examination thereof (R. V, 3694, 3937), and particularly of his cross examination beginning at page 3897. See, as strikingly illustrative of this fact, that part of his cross examination which, when asked concerning a letter written on September 17, 1927 (Ex. 1499, R. XXII, 13992), before either Stevenson or Ackerman became connected with the G.C.A., by Rummel, then assistant business manager of the G.C.A., to the witness, he attributes to each of a number of commonplace statements therein, wholly devoid of hidden significance, a most sinister implication denoting the closing down of a glass factory.

tions for the limitation of production" (brief 313), or in other words, as we understand it, that the present statistical procedure of the G.C.A. is not in itself illegal and would become so only *if* "sanctions" were applied to limit production through concerted action. It is a sufficient answer to say that no sanctions have in fact been applied, and that it has never been used as an implement thereto.

But an examination of the form of report in question (Ex. 607, R. 13218, App. B. to our main brief) will disclose that there is no information contained therein that can, by any reasonable interpretation, be considered to be in violation of the law or intended for use in furtherance of the conspiracy. It contains an historical record of actual shipments beginning with the year 1936 (Ex. 607 was issued for February, 1941), for the industry and for the particular company involved; a record of current statistics setting forth, for the industry and for the company for the current month, figures as to active capacity, production, percentage of production to capacity, shipments and percentage of shipments to capacity; and similar statistics for the year to date and for the moving year ending on the last day of the month for which the report is issued. It also contains a report of tonnage for the month, for the year to date and for the moving year, stated in terms of tons packed by the industry and by the company; and the average weight of bottle for the industry and for the company, respectively. The figures in the column headed "%of Total" are nothing more or less than the results of simple mathematical calculations readily made by dividing the figures indicated for each company by the industry figures. There are no "forecast figures" such as were contained in the earlier form of report; and there are no figures relating to other than wholly past and closed transactions.

We respectfully ask the Court to examine this report as it is set forth in the appendix to our main brief, and are confident that it will be found to be wholly unobjectionable

in the light of its decisions in trade association cases involving generally similar situations.

The District Court did not find that the new form of statistical report was in violation of law or in furtherance of the conspiracy, but merely set forth in its findings the substance thereof (Finding 506, R. X 7377).

The whole forecast system, as we have already seen, had become dormant long before the earlier form of report was questioned by counsel for one of the G.C.A. members, and the G.C.A., in good faith, and by the overt act of making the change indicated, wholly and formally abandoned any practice in this regard to which there could be any possible ground for complaint or criticism.

V.

THE APPELLANTS DID NOT IMPROPERLY NOR UNLAWFULLY PREVENT EXPANSION OF THE GLASS INDUSTRY.

We believe this phase of the case is sufficiently covered in our main brief (pp. 40-46).

VI.

THE DECREE.

Paragraph 37. (R. I, 7678) As we have already seen (our main brief, p. 47), the District Court enjoined the appellants from holding any further meetings of the statistical committee, "and from establishing any committee, organization, or group *having duties, functions, or activities of a nature similar to or identical with those of said committee,*" and directed an amendment of the certificate of incorporation and by-laws of the G.C.A. so as to accomplish this result. The appellee contends in its brief (p. 391, note 28) that

> "In view of the district court's statement that the Association should continue 'merely as a statistical and research body' (Op., R. 160), it is probable that a *com-*

> *mittee whose duties were strictly limited to general statistics and research* would not be construed to be carrying on activities 'similar to or identical with those of' the present statistical committee." (Emphasis ours.)

This, as we see it, would engraft upon the order of the District Court a modification or proviso not found in the language used, for it clearly, as it stands and when given its ordinary meaning, bars the G.C.A. from having in the future any committee to deal with the subject of statistics, which was the general duty of the old committee.

Paragraphs 38 and 39. By these paragraphs (R. X 7678-79), the G.C.A. is, as we have seen (our main brief, p. 49), enjoined from continuing in office its present officers and directors who are officers, directors or employees of any of the defendant corporations, and from electing, employing or continuing in office or in its employ, any person who is at the same time an officer, director, agent or employee of any of such corporations; and is directed to submit the names of its new officers and directors to the District Court for its approval, and so amend its certificate of incorporation and by-laws as to assure the obedience to this order.

The appellee in its brief (p. 394) states that "by prohibiting the election or the employment of representatives of the other appellants as officers, directors, or employees of the Association, the court took the best means, short of its dissolution, of assuring that it would not in the future be made a channel for illegal conspiracies," thus implying that the only means the Court possessed to assure obedience to its decree was to either dissolve the G.C.A. completely, or seriously impair and practically destroy its value to the industry by requiring that the corporations, who comprise substantially 74 per cent of its membership in figures of production, shall have no voice in its affairs. We submit that, upon the law and the evidence, relief of

this character is neither required nor justified in this case, and that this is particularly true when we bear in mind that the G.C.A., if it ever did commit any acts in violation of law or in furtherance of the conspiracy, had in all respects ceased so to do a considerable period of time before this action was filed.

Paragraph 40. By this paragraph, restrictions and limitations of various kinds are imposed upon the future operations of the G.C.A. These provisions need not be reconsidered here (see our main brief p. 50) except with relation to certain points sought to be made in the appellee's brief.

By subparagraph 1 (c) the appellants are restrained from agreeing, etc. "to collect * * * or distribute data concerning the production * * * of glassware * * * where there is *any* disclosure of data concerning *any* particular manufacturer *or* where the purpose or effect is to coerce or intentionally persuade any manufacturer * * *." The appellee in its brief contends that the fair interpretation of this order is only to enjoin a disclosure to *third persons* and which might have a coercive or persuasive effect (Appellee's Br. p. 395, note 30). But is the order so limited in its scope and application? *Observe* the action enjoined is the collection, etc. of data where there is *any* disclosure concerning any particular manufacturer. If this language means what it says, it is not susceptible of the modified or qualified interpretation suggested by the appellee, and it clearly is, as we contend in our main brief, too broad and all-inclusive and in conflict with the law, as announced in some of the earlier decisions of this Court. And *observe* the use of the word "or" and not the word "and" in the concluding portion of this subparagraph, clearly indicating an intention to enjoin (a) the collection etc. of data where there is *any disclosure* of data concerning any particular manufacturer, and (b) the collection etc. of data where the purpose or effect is to coerce, etc. * * *

By subparagraph 1 (d), the appellants are enjoined from agreeing etc. to distribute or report *any* statistics or statistical compilations concerning *any* aspect of the manufacture * * * of glassware * * * (excepting information bearing upon royalties and association dues) * * * unless such information is made fully and fairly available to the *general public* at the time of its initial dissemination.

The appellee challenges the accuracy of the broad interpretation we have placed upon this order (Appellee's Brief, pp. 394-5, note 31) in our main brief (p. 53), and contends that it is limited to "statistics or statistical compilations, and furthermore, when reasonably interpreted, applies only to the type of industry statistics which the Association has employed in support of its quota system." But what is meant by "statistics and statistical compilations" which the appellee says are alone banned by this order? And how can the G.C.A. have knowledge, sufficiently definite to govern its conduct, as to what is or is not a matter of statistics or statistical compilations within the meaning of this order? And where is there anything in the language used to indicate a purpose to include only such industry statistics as the G.C.A. has heretofore used in support of its quota system? And why should the G.C.A. be required to disclose to the "general public" all that it does by way of statistics or statistical compilations which obviously might well include the details and results of study and research of a highly confidential nature?

We believe the other features of this phase of the case are sufficiently covered in our main brief.

Respectfully submitted,

LUTHER DAY,
RUFUS S. DAY,
Attorneys for Appellants.

JONES, DAY, COCKLEY & REAVIS,
Of Counsel.